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Federal Communications Commission
Office of Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re	)	
	)	
Implementation of Section 25	)	MM Docket No. 93-25
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

REPLY COMMENTS OF TIME WARNER CABLE

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Date: May 30, 1997

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SUMMARY

Time Warner Cable herein replies to comments filed in the above-captioned proceeding to implement Section 335 of the Communications Act of 1934 ("Communications Act"), concerning the public interest obligations of Direct Broadcast Satellite ("DBS") service providers. Not surprisingly, a number of existing DBS providers have argued that as a new competitor they should be subject only to minimal regulations, without any public interest responsibility other than the bare-bones obligations expressly mandated by Section 335. Such arguments ignore the tremendous growth of DBS as a competitive service and advances in related technology since the enactment of Section 335 of the Communications Act.

These DBS commenters provide no evidence that DBS cannot continue to thrive and to vigorously compete with cable and other multichannel video programming distributors unless DBS is exempted from comparable regulatory requirements. Indeed, as the Commission and several commenters have recognized, DBS has become the functional equivalent of, and a vibrant competitor to, traditional cable television, as attested by DBS' steady gains in subscribership. Given the emergence of DBS, a level playing field is now required to ensure a truly competitive environment.

As Time Warner Cable previously commented, it believes that the Commission should undertake a thorough analysis of the public interest obligations imposed by federal law or regulation on cable television operators, including regulations regarding access to programming, channel occupancy limits, leased access and carriage agreements. Upon completion of such review, if the Commission determines that a particular obligation remains essential to advance the public interest, then the Commission should impose analogous obligations on DBS providers. On the other hand, if the Commission finds that a particular

public interest obligation is now unnecessary, DBS providers and cable operators should be equally free to compete, both unfettered by that regulatory burden.

In addition, where a DBS provider voluntarily elects to retransmit any local television station, it must be subject to mandatory carriage requirements within that station's Area of Dominant Influence ("ADI") or Designated Market Area ("DMA"). DBS providers opting to provide local signal carriage cannot be granted the freedom to pick and choose the stations they carry. To allow otherwise could threaten the continued viability of the weaker stations in an ADI or DMA, contrary to Congressional findings that must carry requirements preserve the benefits of free, over-the-air local broadcast television and thereby promote the widespread dissemination of information from a multiplicity of sources.

DBS providers further argue that the Section 335(b) set-aside of DBS channel capacity for noncommercial programming of an educational or informational nature should be limited to just 4 percent (the statutory minimum). However, regulatory parity dictates the imposition of a 7 percent set-aside on DBS providers, an amount which would more closely approximate the public, educational and governmental ("PEG") access requirements imposed on cable operators. In addition, cable operators spend millions of dollars and countless work hours each year to meet PEG programming support requirements. Time Warner Cable thus believes that where a DBS provider voluntarily elects to become a local media outlet, such DBS provider clearly should be subject to obligations analogous to a cable operator's PEG access support requirements, <u>over and above</u> the minimal channel capacity set-aside. The set-aside of DBS capacity will not advance the goal of localism unless DBS providers contribute to the funding for creation of unique local programming not already ubiquitously available over local broadcast television.

Finally, the plain language of Section 335 and the underlying legislative history clearly impose the responsibility for complying with the obligations contained in that statutory section on the DBS program packager, whether or not the DBS program packager is also the DBS licensee. And as a practical matter, enforcement would certainly be easier if such requirements were imposed directly on the DBS program packager since the statutory public interest obligations concern programming, not technical matters.

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WASHINGTON, D.C. 20554

In re	)	
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Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)))	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	))	

To: The Commission

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable,[1] by its attorneys, submits these reply comments in response to the Commission's Public Notice[2] in the above-captioned proceeding to implement Section 335 of the Communications Act of 1934 (the "Communications Act"),[3] concerning the public interest obligations of Direct Broadcast Satellite ("DBS") service providers. Time Warner Cable's April 28, 1997 Comments demonstrated that, in the interest of regulatory parity, the Commission should either extend various regulations imposed on traditional cable operators to DBS providers, or relieve cable operators of such burdens. Time Warner Cable also explained that, where any DBS provider voluntarily elects to retransmit local television

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[1]Time Warner Cable, a division of Time Warner Entertainment Company, L.P., operates numerous cable television systems across the United States. An affiliate of Time Warner Cable holds an interest in PRIMESTAR Partners, L.P., a direct-to-home satellite programming service provider. Other affiliates of Time Warner Cable provide programming to multichannel video programming distributors ("MVPDs").

[2]FCC 97-24, released January 31, 1997 ("Notice").

[3]47 U.S.C. § 335. That Section was added by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. 102-385, 106 Stat. 1460 (1992).

stations in a particular Area of Dominant Influence ("ADI") or Designated Market Area ("DMA"), such provider must assume the same associated regulatory responsibilities attendant on cable systems. Finally, Time Warner Cable demonstrated that Section 335 of the Communications Act provides the Commission with jurisdiction over not only DBS licensees, but also any entity that selects, packages and markets DBS programming service. Not surprisingly, existing DBS providers have argued that they should be subject to only minimal regulations without any public interest responsibility other than the bare-bones obligations mandated by Section 335. Such arguments ignore the tremendous growth of DBS as a competitive service and advances in related technology since the 1992 Cable Act, as recognized by the Commission and by a number of commenters in this proceeding.

I. DBS SERVICE PROVIDERS SHOULD BE SUBJECT TO ADDITIONAL PUBLIC INTEREST OBLIGATIONS BEYOND THE STATUTORY MINIMUM.

DBS providers argue that, as a "nascent service," no public interest obligations should be imposed upon them beyond the minimum political advertising requirements and channel set-aside for non-commercial, educational programming expressly imposed by Section 335 of the Communications Act. For example, American Sky Broadcasting L.L.C. ("ASkyB") asserts that such "excessive regulation" might "undermine" the goal of promoting DBS as an alternative to cable.[4] United States Satellite Broadcasting Company ("USSB") claims that "[i]ncreasing the burden of public interest requirements at this point would unduly handicap DBS in attempting to recoup its investments and to confront the

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[4]ASkyB Comments at 9.

challenge of cable competition."[5] Similarly, DirecTV, Inc. ("DirecTV") voices concern that specific public interest responsibilities not "undercut robust competitive development."[6]

These DBS commenters offer no specific reasons why or concrete evidence how additional public interest responsibilities would suddenly render them noncompetitive, particularly given the growth of DBS and advancements in DBS technology. As the Commission has recognized, "[t]he DBS industry has grown and changed dramatically"[7] since its "tentative proposal" in 1993 not to adopt public interest obligations for DBS providers beyond the statutory minimum. DBS has become the functional equivalent of, and a vibrant competitor to, traditional cable television, as attested by DBS' steady gains in subscribership, notwithstanding certain DBS commenters' conclusory statements.

In its most recent report to Congress on competition in the video programming industry, the Commission documented that subscribership to DBS had "continued to increase rapidly over the past year," from nearly 1.6 million households at the end of September 1995 to 3.8 million subscribers at the end of October 1996.[8] Industry observers projected a 1996 year end total of between 4.3 and 4.5 million DBS subscribers.[9] Further, "DBS services have grown at a rate making DBS receiving equipment one of the most successful new

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[5]USSB Comments at 11.

[6]DirecTV Supplemental Comments at 3.

[7]Notice at 1.

[8]Third Annual Report, CS Docket No. 96-133, FCC 96-496 (released Jan. 2, 1997) at ¶ 39.

[9]Id. at ¶ 40.

consumer electronics product introductions in history in terms of units sold."[10] The Commission noted that most observers believe that the strong growth of DBS will continue through the end of this decade. Specifically, observers have projected that, by the year 2000, there will be 13 to 15 million DBS households and that DBS operators will account for over 20 percent of all MVPD subscribers.[11]

A number of commenters in this proceeding have recognized the present strength of the DBS industry. The Alliance For Community Media and National Association of Telecommunications Officers and Advisors ("NATOA") observe that, with over 4 million subscribers in 1997, DBS "has emerged as a strong competitor to cable television, with each provider currently offering approximately one hundred channels; all have discussed their imminent plans to expand further by utilizing compression technology."[12] The Association of America's Public Television Stations and the Public Broadcasting Service ("PBS") detailed the changes in DBS service and the DBS industry during the course of this proceeding:

> Significant changes have occurred since the Commission first considered a DBS rulemaking in 1993. When the Commission issued its initial request for comments, the DBS industry was in its infancy. While a number of permits had been issued pursuant to Part 100 of the Commission's rules, no high-power DBS system had begun operations, and the commercial feasibility of the DBS medium was still in doubt. The future of DBS technology was uncertain; among other things, available compression ratios limited the number of channels that could be offered to DBS subscribers.

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[10]Id. at ¶ 40 (footnote omitted).

[11]Id. at ¶ 38 (citations omitted).

[12]NATOA Comments at 8.

> Today, the status of the industry is far different. Satellites have been successfully launched, and DBS technology has advanced significantly. Several DBS services have begun operations and have succeeded in gaining millions of subscribers . . . . Moreover, higher compression ratios are now available, enabling each DBS operator to offer subscribers more than 150 channels . . . . The commercial success of DBS has been widely discussed . . . . The perception that DBS has a lucrative future is reflected in the high prices recently paid for DBS business opportunities . . . .
>
> In view of the quick start-up and commercial development of the industry, there is no need for the Commission to stay its hand in regulating DBS. In 1993, there was some doubt as to whether regulation would stifle the development of a fledgling industry, and some argued that the Commission should refrain from imposing regulation until the industry was well established. At this point, there can be no basis for such arguments. The Commission should have no hesitation in implementing Section 25(b) to the full extent of Congress's intent . . . .[13]

PBS also concluded that:

> Both broadcasters and cable operators are subject to various public interest requirements. Particularly in view of the rapid commercial development of DBS, there is no reason to exempt DBS operators from public interest obligations.[14]

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[13]PBS Comments at 3-5 (footnotes omitted).

[14]Id. at 52. Similarly, in his testimony in the ongoing compulsory license proceeding before the Copyright Office, the Vice President and General Counsel of the Association of Local Television Stations ("ALTV") recognized that, while satellite carriers now serve only a small portion of television households:

> the satellite carriers are in the business to expand. They hope to attract not only noncable households, but also cable subscribers. Indeed, they would hope to supplant cable as the home's multichannel video providers.

Testimony of James J. Popham in Copyright Office Docket No. 97-1 ("Popham Testimony") at n.15.

Given the emergence of DBS, a level playing field is now required to ensure a truly competitive environment. As Time Warner Cable explained in its initial comments, in order for the Commission to properly carry out its mandate to implement Section 335, it should undertake a thorough analysis of the public interest obligations imposed by federal law or regulation on cable television operators. Upon completion of such review, if the Commission determines that a particular obligation remains essential to advance the public interest, then the Commission must impose analogous obligations on DBS providers.[15] On the other hand, if the Commission finds that a particular public interest obligation is now unnecessary, DBS providers and cable operators should be equally free to compete, both unfettered by that regulatory burden.

There is no reason to exempt DBS from equivalent regulatory treatment just because it was established more recently. Although open video systems ("OVS") are another emerging multichannel competitor intended to provide increased competition,[16] Congress has subjected them to numerous Title VI provisions[17] as well as relevant FCC cable

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[15]These include regulations regarding access to programming, channel occupancy limits, leased access and carriage agreements.

[16]See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 3 Communications Reg. (P&F) 196 (1996) ("OVS Second Report and Order") at ¶¶ 2, 24 ("[t]he underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator") (footnote omitted).

[17]These include public, educational and governmental ("PEG") access requirements. 47 U.S.C. § 573(c)(1)(B).

television rules.[18] The 1996 Telecommunications Act[19] also subjects OVS operators to non-discrimination requirements regarding their programmer-customers, as well as channel occupancy limits where channel capacity demand exceeds supply.[20] Just as OVS facilities enjoy the financial backing of incumbent telephone companies, DBS providers are financed by such major entities as General Motors, News Corporation Ltd. ("News Corp.") and MCI Communications Corporation ("MCI"). There is simply no reason to treat DBS providers differently than OVS providers.[21]

Similarly, extensive regulatory obligations were imposed on the cable industry while it was still a nascent service with fewer subscribers than DBS now enjoys.[22] As early as 1966, the Commission adopted signal carriage, non-duplication and distant signal

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[18]These include must carry, sports blackout, network nonduplication and syndicated exclusivity rules. 47 U.S.C. § 573(b)(1)(D).

[19]Pub. L. 104-104, 110 Stat. 56 (1996).

[20]47 U.S.C. §§ 573(b)(1)(A)-(B). Compare 47 U.S.C. § 548 (cable program access requirements).

[21]See Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

[22]The cable industry served only an estimated 1.575 million subscribers in 1966. Warren Publishing, Television & Cable FactBook, Cable Vol. 65, 1997, at F-1. See also Paul Kagan Associates, Cable TV Financial DataBook, 1996, at 10 (citing a figure of 1.5 million basic subscribers in 1965). In contrast, DBS now serves more than 4 million estimated subscribers.

requirements for cable operators.[23] Thus, the favoritism now sought by certain DBS providers would be unprecedented as well as unnecessary.[24]

Time Warner Cable emphasizes, however, that it does not simply seek the imposition of additional regulations on DBS providers. As noted in its Comments, Time Warner Cable has challenged and continues to oppose a number of the existing regulations imposed on cable operators. Rather, Time Warner Cable seeks regulatory parity. Time Warner Cable believes that the best way to achieve such parity is the removal of unnecessary regulations from traditional cable systems[25] in light of the undisputable competition from DBS and other new MVPDs.

II. LOCAL SIGNAL CARRIAGE.

EchoStar Communications Corporation ("EchoStar") argues that DBS providers should be allowed to carry local broadcast signals as they choose to, without any further

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[23]Second Report on CATV Regulation, 6 RR 2d 1717 (1966) (subsequent history omitted).

[24]In his testimony before the Copyright Office, James J. Popham noted that, historically, "the FCC readily imposed must carry requirements on cable systems long before cable achieved a degree of market penetration which was meaningful in most markets." Popham Testimony at n.15.

[25]In addressing the Cable Television Public Affairs Association last month, a senior counsel to Chairman Hundt reportedly acknowledged the "huge public interest burden" of must carry, PEG channels, leased access and closed-captioning requirements on cable operators. He concluded that "[t]he American people are getting a great deal from the cable industry . . . ." See "Hundt Aide says Cable is Carrying 'Huge' Public Interest Burden," Communications Daily, May 1, 1997, at 8.

obligation.[26] According to its Comments, the Commission should "embrace" the provision of local broadcast signals by DBS, not "penalize" such carriage by imposing regulations as a result. EchoStar claims that DBS carriage of broadcast signals will level the playing field and make it a more effective multichannel competitor.[27] But EchoStar cannot be heard to seek the benefits of carriage without the attendant responsibilities imposed on its competitors, all ironically in the name of a level playing field. Again, the DBS commenters have offered no support for the claim that DBS requires an exemption from regulations in order to compete, particularly where a similar exemption is not provided to OVS.[28] Where a DBS

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[26]Of course, current copyright law does not allow DBS providers to take advantage of the compulsory copyright license to retransmit a network television station into any area where an affiliate of that network is available off air. In the compulsory license proceeding before the Copyright Office, the National Association of Broadcasters ("NAB") has taken the position that a satellite carrier should not qualify for the compulsory license in any particular television market unless, if it carries any local station in that market, it is required to carry all stations licensed to that market. Comments and Testimony of the NAB in Docket 97-1 ("NAB Testimony") at 10. Similarly, ALTV seeks a compulsory license whereby any MVPD could retransmit the signals of local television stations in their home markets gratis if it retransmitted all local stations to all subscribers in that market. Popham Testimony at 2. The Network Affiliated Stations Alliance ("NASA") also commented that an extension of the compulsory license to satellite carriers must be accompanied by statutory requirements that all local stations be carried. "No rational distinction can be fashioned for exempting satellite carriers from a must carry requirement." Statement of NASA on The Satellite Compulsory License in Docket 97-1 at 26.

[27]EchoStar Comments at 6.

[28]Due process requires the Commission to treat similarly situated entities in the same way. Compare Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). In this case, the failure to impose equivalent carriage requirements to similarly situated MVPDs could call into question the constitutionality of such requirements as applied.

provider voluntarily elects to retransmit any local station, it must be subject to mandatory carriage requirements within that station's ADI or DMA.[29]

EchoStar's argument is particularly inappropriate in light of Congressional findings that must carry requirements preserve the benefits of free, over-the-air local broadcast television and thereby promote the widespread dissemination of information from a multiplicity of sources. The Supreme Court found these to be important government interests under its constitutional analysis.[30] In effect, EchoStar seeks the freedom to pick and choose the stations it carries, thus implicating Congress' concerns with the continued viability of independent stations. As Stanley Hubbard, the President and CEO of television licensee Hubbard Broadcasting -- a shareholder of USSB -- testified before Congress, if SKY were to

[29]Other regulations attendant to such local carriage should include network nonduplication, syndicated exclusivity, sports blackout and must buy requirements. See Time Warner Cable Comments at 32-38. Similarly, ALTV has argued that:

> The dictates of competitive parity, to say nothing of maintaining the basic integrity of the exclusive rights granted copyright licensees, mandate that all multichannel video providers play by the same rules and protect the syndicated and network exclusivity rights of local television stations. Compliance with such requirements no longer may be considered technically impossible even for DBS and other satellite providers.

Popham Testimony at 14. NAB also supports imposition of syndicated exclusivity requirements on satellite carriers. NAB Testimony at 37.

[30]Turner Broadcasting System v. FCC, Case No. 95-992, 1997 U.S. LEXIS 2078, decided Mar. 31, 1997, at * 19.

carry other stations in one of Hubbard's television markets, but not Hubbard's station, "I think we'd be in deep, deep trouble."[31]

The apparent breakup of the merger between ASkyB and EchoStar has not eliminated the need to consider mandatory carriage requirements for DBS in this proceeding. EchoStar's Chairman reportedly has stated that his company still desires to retransmit local TV signals.[32] Other DBS providers also are likely to seek to carry some local broadcast signals in certain markets in the future. Assuming that the EchoStar/ASkyB proposal to amalgamate two of the three full-conus DBS satellites licensed by the FCC does not materialize, channel capacity restraints will impose an even greater risk that any DBS provider electing to retransmit local signals will cherry pick stronger stations to the detriment of the weaker stations in an ADI.[33]

III. CHANNEL SET-ASIDE.

Section 335(b) of the Communications Act directs the Commission to require DBS providers to set aside 4 to 7 percent of their channel capacity for noncommercial

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[31]Testimony of Stanley Hubbard before the Senate Committee on Communications, Science and Technology, April 10, 1997. See SCBA Comments at 21. Moreover, because DBS is not subject to the same television station cross-ownership rules as cable, the Congressional concerns regarding discrimination in carriage apply with even greater force to DBS.

[32]Communications Daily, May 14, 1997 at 7.

[33]In adopting cable carriage requirements, Congress expressed concern that the loss of carriage for even a small number of stations would be contrary to the public interest. See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 64 (1992) ("The Committee wishes to make clear that its concerns are not limited to a situation where stations are dropped wholesale by large numbers of cable systems."). DBS threatens to carry far fewer stations than did cable operators prior to reenactment of must carry, thus creating a far greater threat of harm.

programming of an educational or informational nature. DBS providers argue that this set-aside should be limited to just 4 percent, the statutory minimum, again because DBS is a "nascent" service.[34] In fact, a 7 percent set-aside would more closely approximate the PEG access requirements imposed on cable operators. For example, Time Warner Cable's New York City franchises require it to set aside nine of its 75 total channels in Manhattan (12 percent of its total channels).[35] Moreover, the number of channels required to be set aside in Manhattan increases as Time Warner increases the number of activated channels. Time Warner is required to set aside 20 percent of all channels it activates in excess of 75 for PEG access in Manhattan.

USSB goes so far as to assert that the minimum standards imposed upon DBS providers are "more stringent than those imposed upon cable," because cable is not obligated to provide a "50% cost subsidy" to certain public service programmers.[36] That claim is not only false, but ridiculous. Cable operators -- which today often have less capacity than DBS systems -- must provide PEG access channels for free, and forego the revenues that could be produced by commercial services. So unlike DBS, cable operators provide a 100% cost subsidy in making PEG channel capacity available. But these set-asides, as significant as they are, represent only part of a cable operator's PEG obligations and expenses. As Time Warner Cable detailed in its comments, it spends millions of dollars and countless work

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[34]See, e.g., ASkyB Comments at 13-14, USSB comments at 7, DirecTV Supplemental Comments at 5.

[35]Time Warner Cable Comments at 40-41. See also Comments of National Cable Television Association ("NCTA") at 21 (detailing various operators' PEG obligations).

[36]USSB Comments at 11.

hours each year to meet PEG programming support requirements. Typical PEG programming obligations might be in the form of in-kind contributions, such as the provision of cameras, studio equipment, mobile vans, modulators, video tape recorders, fully equipped studio facilities, or other production equipment; or in the form of periodic cash payments to local authorities or access organizations to produce PEG access programming.[37]

Time Warner Cable thus believes that where a DBS provider voluntarily elects to become a local media outlet, either by retransmitting broadcast signals on a local basis or otherwise tailoring its service offering for specific regions or localities, then such DBS provider clearly should be subject to obligations analogous to a cable operator's PEG access support requirements, over and above the minimal channel capacity set-aside. Congress has directed that the Commission explore the opportunities for DBS service providers to advance the goal of localism under the Communications Act. The set-aside of DBS channel capacity will not advance this goal unless DBS providers contribute to the funding for creation of unique local programming not already ubiquitously available over local broadcast television.

USSB argues that particular channels need not be devoted exclusively to meeting DBS' statutory public service obligation.[38] DirecTV asserts that DBS providers should be able to convert their required channels into "cumulative exhibition time" based upon "cumulative hours."[39] Time Warner Cable agrees with NCTA's conclusion, however, that DBS providers must not be permitted to "bury" their noncommercial programming in little-

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[37]See Time Warner Cable Comments at 41-42.

[38]USSB Comments at 7.

[39]DirecTV Supplemental Comments at 7.

watched dayparts when cable operators must dedicate discrete PEG channels on a full-time basis.[40] Time Warner Cable also agrees with US West Inc. that DBS providers should not be permitted to count existing cable network programming towards meeting their set aside obligations, just as such networks do not count towards a cable operator's PEG obligations.[41]

IV. JURISDICTION OVER "DBS PROVIDERS."

Some commenters argue that the Commission should impose the responsibility for complying with the public interest obligations of Section 335 exclusively on the DBS licensee, and apparently thus would exempt an entity responsible for the selection, packaging and marketing of the actual DBS program service delivered directly to consumers under Part 100 of the Commission's rules.[42] However, as Time Warner Cable demonstrated in its Comments, such an interpretation ignores the plain language of the statute as well as the underlying legislative history.[43]

It is true that, to date, the DBS licensee typically has also been the DBS program packager. However, as the DBS marketplace evolves and business arrangements increasingly

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[40]NCTA Comments at 22.

[41]US West Comments at 8-9.

[42]See PBS Comments at 29-34; Center for Media Education *et al.* Comments at 16-17; NATOA Comments at 9.

[43]See Time Warner Cable Comments at 44-46.

provide that the DBS licensee and the DBS program packager are separate entities,[44] the Commission must recognize that Section 335 dictates that it is the DBS program packager -- the true DBS "provider" -- which is responsible for complying with the obligations imposed pursuant to that statutory section.

The obligations imposed by Section 335 do not refer to the DBS "licensee." On the contrary, Section 335(a) specifically requires the Commission to impose, "on providers of direct broadcast satellite service," various public interest requirements.[45] Likewise, the 4-7 percent channel set-aside in Section 335(b) is to be applied to the "provider" of DBS service.[46] It is clear from the legislative history that Congress understood and anticipated that the DBS provider would not necessarily be the DBS licensee. Rather, the legislative history of Section 335 is clear that the requirements therein

> are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the

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[44]A letter dated May 5, 1997 from the Office of the U.S. Trade Representative and two executive departments to Chairman Reed Hundt recommended "that the Commission promptly undertake and conclude a rulemaking proceeding on whether and how foreign ownership restrictions and public interest criteria should be applied to subscription DBS services on U.S. licensed satellites . . . ." In referring to "DBS services" and to "U.S. licensed satellites," the Executive Branch apparently has recognized a possible distinction between the two.

[45]47 U.S.C. § 335(a) (emphasis added).

[46]47 U.S.C. § 335(b).

> requirements of this subsection unless it seeks to provide video programming directly.[47]

One commenter opines that this legislative history is "irrelevant because it refers to an earlier version of the DBS set-aside provision."[48] At the time that this House Report was drafted, the House version of what later would become Section 25 of the 1992 Cable Act (codified as Section 335 of the Communications Act) applied the 4-7 percent channel set-aside (now Section 335(b) of the Communications Act) to the "provider" of DBS service.[49] The House provision regarding political broadcast requirements and other public interest requirements was applicable to "direct broadcast satellite systems," not specifically to the "providers" of service over such systems.[50] Accordingly, the section of legislative history quoted above specifically relates only to the 4-7 percent channel set-aside requirement.

However, as enacted, Section 335 specifically refers to the "provider" of DBS service for purposes of both the 4-7 percent channel set-aside requirement contained in Section 335(b) and the political broadcast and public interest requirements contained in Section 335(a). At some point in the legislative process after the House Report was drafted, the term "provider" was added to apply to the political broadcast and public interest requirements

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[47]H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) ("House Report") (emphasis added).

[48]PBS Comments at 32 n.42.

[49]House Report at 25 (Section 18(a)(4) of House bill).

[50]See id. (Section 18(a)(3) of House bill). Section 18(a)(6) of the House bill defined "direct broadcast satellite systems" as including "(i) satellite systems licensed under Part 100 of the Federal Communications Commission's rules, and (ii) high power Ku-band fixed service satellite systems providing video service directly to the home and licensed under Part 25 of the Federal Communications Commission's rules."

contained in Section 335(a). There is no reason to believe that the House Report's definition of a DBS "provider," as set forth above, would not also logically apply to the requirements set forth in Section 335(a). It simply makes no sense to assume that the House would define a DBS "provider" one way for purposes of the Section 335(b) channel set-aside requirement and another way for purposes of the Section 335(a) public interest requirements.[51]

The Commission might require the DBS licensee to ensure that its transponder lessees comply with these requirements. As a practical matter, however, enforcement would certainly be easier if such requirements were imposed directly on the DBS provider. The statutory public interest obligations concern programming, not technical matters. The Commission also might reasonably conclude that its ability to enforce compliance with various public interest obligations would be enhanced by imposing joint responsibility on the DBS licensee and any unaffiliated DBS provider using that DBS licensee's satellite to provide DBS programming directly to subscribers. But in no event should a DBS provider escape

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[51]Likewise, the Commission has tentatively determined that the responsibility for compliance with closed captioning requirements should be placed on "video programming providers," including DBS providers, which it defines as "all entities who provide video programming directly to a customer's home." Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, 12 FCC Rcd 1044 (1997) at ¶ 28. The Commission similarly has extended its cable equal employment opportunity ("EEO") requirements to DBS program packagers, whether or not they are licensees. See 47 C.F.R. § 76.71(a). The Commission's understanding of what it means to be a "provider" of DBS services cannot logically mean one thing for purposes of the closed captioning and EEO requirements and yet mean another for purposes of the Section 335 public interest obligations.

responsibility merely because it leases capacity from a DBS licensee without holding an attributable interest in such licensee.

Respectfully submitted,

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